

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SANDRA L. GOOD,	:	CIVIL NO. 1:06-CV-1736
	:	
Plaintiff	:	(Judge Conner)
	:	
v.	:	(Magistrate Judge Smyser)
	:	
BOROUGH OF STEELTON, DENNIS	:	
C. HEEFNER, SYLVIA STONER	:	
and JOHN TRISH,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

By Order of September 30, 2008, the court dismissed all claims against defendants the Borough of Steelton, Dennis C. Heefner, Sylvia Stoner and John Trish. The Order denied the motion of the plaintiff for leave of court to supplement the second amended complaint. The Order permitted a third amended complaint that alleges one or more of the following:

- a. Personal involvement on the part of defendants Heefner and Stoner;
- b. Sufficient facts to suggest that Trish engaged in conduct that rendered the Borough appeals procedure unavailable or patently inadequate. (Citation omitted).

The Third Amended Complaint names two defendants, defendants Stoner and Trish, both identified by the plaintiff as Borough of Steelton Codes Enforcement Officers¹. The Third Amended Complaint claims violations of the plaintiff's First, Fifth and Fourteenth Amendment rights. It alleges deprivation of the plaintiff's substantive due process rights and of her right to equal protection of the law. It alleges that the defendants denied procedural due process by "direct blocking and obstructing actions" that blocked and obstructed the plaintiff's procedural avenue(s) to challenge the Borough's directive to her to replace her sidewalk. It alleges that the plaintiff "has been held to different standards and different time lines than those of her neighbors with regard to local statutes and ordinances which are vague and over broad" and that the plaintiff was "deprived of actual Notice of the ordinances to which she was later compelled."

1. The defendants' brief states that defendant Stoner is the Borough Codes/Zoning/Planning Officer and that defendant Trish is the Borough Property Maintenance Official. The brief does not address defendant Heefner's title, as he is not named as a defendant in the Third Amended Complaint.

The Third Amended Complaint alleges that the plaintiff's Fourth Amendment rights were violated in that her "residences, both owned and rented, were entered without notice and her personal effects rifled . . .", and acknowledges that this is a new allegation. It also alleges a retaliatory prosecution brought against the plaintiff in violation of her First Amendment rights.

The Third Amended Complaint alleges as to defendant Stoner that, after defendant Trish had informed the plaintiff that her sidewalk was in disrepair and must be repaired within thirty (30) days and of her right to challenge that requirement within ten (10) days, when the plaintiff began to inquire into what the Borough of Steelton expected of her as to the repair of her brick sidewalk,

[t]he phone was answered by Sylvia Stoner, a codes enforcement officer personally known to the Plaintiff, who has on many occasions appeared on Plaintiffs property, made decisions about the property, taken action on the maintenance of the property, sent personnel out to venture on to Plaintiffs property without notice or warning, and introduced herself and her attending personnel as being codes enforcement personnel. Stoner informed Good that she had been "with the Borough for seven years." Stoner refused to

answer Plaintiff's call about the expectations for her sidewalk and the possible need to appeal within ten days. When Plaintiff pressed Stoner, Stoner replied that she would have John Trish return Plaintiff's call, and that she would be sure he answered timely enough for Plaintiff to file her appeal if that should be necessary.

A few days later, Plaintiff had not received a call-back from Trish, and once again called the number listed on their letter for the enforcement personnel of the Borough of Steelton, no other contact information having been provided or, apparently, existing. Once again, the phone was answered by Sylvia Stoner, known to be a codes enforcement officer, familiar with all things having to do with codes enforcement, and an employee of the Borough for years longer than John Trish. The conversation was almost identical to the first, with Stoner refusing to deal with Plaintiffs questions, or to look at the correspondence, or to confer with superiors about what to do, or to look at the offending sidewalk. (This sidewalk is less than three blocks away from the Borough Building in Steelton.) Although the hour was very, very late at this point, Stoner still affirmed that Plaintiff would be hearing from her working associate, John Trish, in time to file an appeal if necessary.

By the time Good received contact from John Trish, the appeal period had lapsed. Trish then explained that by referencing repair he actually meant "replacement" of the entire brick sidewalk in order to comply with a previously unannounced ordinance forbidding residential brick sidewalks. Trish assured Good that "everybody who has brick sidewalks in Steelton is going to have to do this." He cited "your neighbors across the street" as being typical of "residential

homeowners" who were happily replacing their brick sidewalks on account of the ordinance.

The duplex property across from Good's house had replaced sidewalks as of this August conversation with Trish, and this was the property he referenced as being typically residential and maintained by their homeowners. However, these properties are income properties and the repair was conducted at a reported cost of \$22,000 by the landlord and not the residents. Furthermore, the replaced sidewalks were not brick. Good was unable to raise \$22,000 on 30 or 60 or even 90 days notice, and now did not even have appeal rights to protest the injustice.

In a last-ditch attempt to avoid litigation, Good wrote to Mayor Hartwick about her intentions to file suit, and also talked to Sylvia Stoner about the same issues of unfair treatment, at which time Sylvia said "you do what ever you have to do with your complaints, and I will be there with my paperwork," explaining that "we can do what ever we want to about sidewalks and things like that," as if sidewalks and not fairness were there issue. Good took Sylvia's remarks to be the end of any possible administrative remedy. The codes enforcement officer did not, for example, say "let's take a second look at the situation". Plaintiff then filed this suit in Federal Court.

(Doc. 66, pp. 4-7).

The basis for the court's permission to the plaintiff to file a Third Amended Complaint was to afford her an opportunity to plead facts as to defendants Stoner, Heefner and

Trish that would, if proven, establish personal involvement. Liability under 42 U.S.C. § 1983 may only be based upon a defendant's personal involvement in conduct amounting to a constitutional violation. *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir. 1976). The complaint must contain averments of the involvement of the defendant in the conduct which caused a violation of the plaintiff's constitutional rights. *Rode v. Dellarciprete*, 845 F.2d 1195, 1209 (3d Cir. 1988).

The Memorandum of September 30, 2008 (Doc. 61) discusses the Rule 12(b)(6) standard, procedural due process and personal involvement in depth, and those legal principles will not be discussed herein.

The Third Amended Complaint does allege facts which, when for Rule 12 purposes the complaint is construed in the light most favorable to the plaintiff, support a reasonable inference of personal involvement on the part of defendant

Stoner² in conduct that can be construed to have interfered with the plaintiff's right to procedural due process.

Defendant Stoner, as a Borough Codes, Zoning and Planning Officer, assured the plaintiff on more than one occasion that the plaintiff would be hearing from John Trish in response to the plaintiff's questions and concerns about her sidewalk and her request to be informed of what the Borough was requiring of her. But the plaintiff did not hear from John Trish. As a result, the plaintiff did not file a timely appeal and allegedly lost her opportunity to challenge the Borough's action. Also, she was not informed that what was being required of her was to replace her brick sidewalk with a poured concrete sidewalk, a measure that she did not consider to be the import of the message "Sidewalk in disrepair." The allegations as to defendant Stoner's personal involvement in the Third Amended Complaint are more indicative of personal involvement on her part than were the allegations in the Second Amended Complaint. See Order of September 30, 2008, Document 61, page 11. In the Third Amended Complaint, the conduct on

2. The defendants' brief notes that defendant Stoner's last name is now Zell. We continue to refer to this defendant as defendant Stoner. A party may move for an order changing the caption.

the part of defendant Stoner is not comparable to that of a desk clerk answering the Code Enforcement Office telephone. She is identified as a Code Enforcement Officer who is described as knowledgeable and experienced and who, according to the Third Amended Complaint, refused to deal with questions from the plaintiff concerning her sidewalk problems and her procedural rights.

The defendant asserts that the new allegations of defendant Stoner's status as a Borough Codes, Planning and Zoning Officer and the fact of her long experience and the circumstance involved in her interactions with the plaintiff, in combination with the earlier allegations of wrongly informing the plaintiff that her calls would be returned, do not give rise to a materially different inference as to her personal involvement. However, these facts do give rise to a materially different inference. The additional facts about defendant Stoner's position and about her role may fairly be seen to support a reasonable inference that she was aware of the plaintiff's interests and concerns about the sidewalk decision(s), was aware of the plaintiff's intent to use

available Borough processes to challenge a directive to her to make costly changes and had some role along with defendant Trish in making decisions affecting the interests, concerns and appeal opportunities of the plaintiff as to her sidewalk.

Accordingly, it will be recommended that the motion to dismiss the amended complaint as to defendant Stoner be denied.

The next question to be addressed is whether the Third Amended Complaint alleges facts supporting an inference of personal involvement on the part of defendant Trish in a denial of procedural due process to the plaintiff.

As the court has decided in the September 30, 2008 Memorandum and Order, the Steelton Borough Code provides procedural due process. The claims of the plaintiff against defendants Trish and Stoner are that they acted so as to cause the procedural due process under the Code to be unavailable to the plaintiff in a matter having a substantial impact upon her property rights. Her contention is that she was required to replace her brick sidewalk with a poured concrete sidewalk

without an opportunity to have notice and a hearing on the issue whether this requirement was lawful. She had not received notice in the violation notice issued by defendant Trish that a sidewalk replacement was to be required. She was given notice that the Borough considered her brick sidewalk to be in disrepair. A reasonable property owner could consider it to be an adequate resolution to repair and retain a brick sidewalk, a matter of perhaps no more than removing, leveling and replacing a number of bricks. Defendant Trish is alleged to have given inadequate notice and to then have failed to return calls from the plaintiff to ascertain what was required of her.

The combination of circumstances and occurrences alleged by the plaintiff in the Third Amended Complaint gives rise to a reasonable inference that defendants Stoner and Trish engaged in conduct that rendered the Borough appeals procedure unavailable or inadequate. Notwithstanding the existence of a procedure that on its face affords due process, a public official's conduct blocking or obstructing a person's efforts to pursue her procedural rights may deny procedural due

process. In *Alvin v. Suzuki*, 227 F.3d 107 (3d Cir. 2000), a teacher's belief that a faculty grievance procedure was inadequate was held not to support an inference that it was futile to use the procedure or an inference that a meaningful procedure was unavailable. Essential elements of procedural due process include notice and an opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319, 348 (1975). The plaintiff's case involves a combination of an alleged inadequate notice and of the lack of an opportunity to be heard that resulted from inadequate notice coupled with inaccessible public officials. Her claim upon examination is not unsubstantial. Her claim is that a lack of adequate notice of her violation effectively caused a grievance process not to be available to her because she was not informed of the Borough's actual expectation. The plaintiff alleges that she was notified in writing by defendant Trish that her brick sidewalk was in disrepair. She did not know what steps were expected of her. She attempted to contact defendant Trish in the Borough's Code Enforcement Office to get further information and clarification. She spoke to defendant Stoner, who told her

that defendant Trish would return her call in time to permit her to appeal if she remained inclined to pursue an appeal.

She did not receive a call from defendant Trish. She called again. Defendant Stoner again told her that defendant Trish would call her, but he did not. The appeal time expired. Then, after the expiration, defendant Trish contacted her and told her that the sidewalk would need to be replaced with a poured concrete sidewalk under the terms of a new ordinance. These facts, assuming their truth, support an inference of personal involvement on the part of defendant Trish in conduct that can reasonably be seen to have rendered the Borough's appeals procedure unavailable to the plaintiff, given the plaintiff's uncertainty about what was being required of her and her inability to get further information.

In their brief (Doc. 64), the defendants make a number of factual assertions about what the defendants, Stoner and Trish, did or did not do after Trish issued a Notice of Violation to the plaintiff addressing her sidewalk's composition and its condition, referring to exhibits filed with

the defendants' motion (Doc. 63) to dismiss the Third Amended Complaint. They characterize the plaintiff's complaint as concerning an alleged failure on defendant Trish's part to promptly return the phone call of the plaintiff. But the plaintiff's pleading alleges that her telephone calls were not returned at all, and were not returned in time for her to pursue a timely appeal. There appear to be material issues of fact relevant to the plaintiff's procedural due process claims, which would appropriately be addressed on summary judgment or at trial rather than in the context of a Rule 12(b)(6) motion addressing the question whether the Third Amended Complaint states a claim upon which relief can be granted. It will be recommended that the plaintiff's procedural due process claims against defendants Stoner and Trish not be dismissed.

The plaintiff was not permitted by the September 30, 2008 Order to bring new claims.

It will be recommended that the claim of the plaintiff in the Third Amended Complaint that her First Amendment right to access to the courts was violated by defendant Stoner, who

is alleged to have retaliated against the plaintiff for pursuing this civil action by initiating and pursuing Borough trash ordinances enforcement proceedings against the plaintiff, be dismissed for the reason that it is a claim that is not permitted by the Order of September 30, 2008, because there has been no motion for leave to amend to include such a claim, and because such a motion if brought would not have merit because the complaint has already been amended three times.

It will be recommended that Fourth Amendment claims stated by the plaintiff in the Third Amended Complaint be dismissed based upon the holding set forth in the Order of September 30, 2008 (Doc. 61), which denied leave to the plaintiff to supplement the second amended complaint. It permitted the plaintiff to allege personal involvement on the part of Heefner and Stoner and facts relating to the Borough's appeals process and conduct of defendant Trish related to that process.

It will be recommended that the court note in its Order that the Third Amended Complaint does not state a claim against

Dennis Heefner. The plaintiff's brief appears to assume that Heefner is a party, but he is not named as a party in the Third Amended Complaint.

The plaintiff has filed a motion for the appointment of counsel. (Doc. 79, filed February 19, 2009). A motion for the appointment of counsel was denied by Order of December 12, 2008. (Doc. 74). This motion is based upon a diagnosis of metastatic liver carcinoma in the plaintiff. The plaintiff argues that she will be affected in her ability to proceed *pro se* in this case.

28 U.S.C. § 1915(e)(1) provides that the court may request an attorney to represent an indigent litigant in a civil case. However, 28 U.S.C. § 1915 does not authorize the district court to require an unwilling attorney to represent an indigent litigant in a civil case. *Mallard v. U.S. District Court*, 490 U.S. 296, 310 (1989).

The United States Court of Appeals for the Third Circuit has developed a number of factors the court should

consider when deciding whether to ask an attorney if he or she will accept the responsibility of representing a *pro se* plaintiff. See *Tabron v. Grace*, 6 F.3d 147 (3d Cir. 1993). The threshold inquiry is whether the plaintiff's case has some arguable merit in fact and law. *Montgomery v. Pinchak*, 294 F.3d 492, 498-99 (3d Cir. 2002). If a plaintiff overcomes this threshold hurdle, the court should consider other factors including 1) the plaintiff's ability to present his or her case considering the plaintiff's education, literacy, experience, ability to understand English and the restraints placed on the plaintiff by incarceration; 3) the complexity of the legal issues involved; 4) the degree to which factual investigation is required and the plaintiff's ability to pursue such investigation; and 5) the degree to which the case turns on credibility determinations or expert testimony. *Tabron, supra*, 6 F.3d at 155-56.

In the United States District Court for the Middle District of Pennsylvania, the need for a list of attorneys available for appointment to represent plaintiffs in potentially meritorious cases has been addressed in Local Rule

83.34. The Middle District Federal Bar Association has assembled a panel of attorneys who may accept appointments at the request of the court in these cases.

The plaintiff's health condition is a relevant factor. The plaintiff may be less able to present the merits of her case as her health may prevent her from doing so. However, the plaintiff has not presented a basis in view of all of the *Tabron* factors for a request to the Middle District Federal Bar Association coordinator to determine whether an attorney is willing to enter an appearance on behalf of the plaintiff in this case. It will be recommended that the plaintiff's second motion for the appointment of counsel be denied.

Accordingly, for the foregoing reasons, it is recommended that the motion to dismiss the Third Amended Complaint be granted in part and denied in part. It is recommended that the Third Amended Complaint be dismissed as to the plaintiff's First Amendment, Fourth Amendment and Fifth Amendment claims. It is recommended that the motion to dismiss be denied as to the 42 U.S.C. 1983 against defendants Stoner

and Trish that they violated the procedural due process rights of the plaintiff by conduct that rendered the Borough appeals procedure unavailable or patently inadequate. It is recommended that the plaintiff's motion for the appointment of counsel be denied and that the case be remanded to this magistrate judge.

/s/ J. Andrew Smyser

J. Andrew Smyser
Magistrate Judge

Dated: March 11, 2009.